Supreme Court, U.S.
FILED

No.

00-495 JUN 20 2000

IN THE

OFFICE OF THE CLERK

Supreme Court of the United States

ARTURO C. ALDERETTE,
Petitioner,

v.

ERNIE ROE, WARDEN,
Respondent.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Arturo C. Alderette #H-40595
C.S.P. – L.A.C. A2-231
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43pp

QUESTION(S) PRESENTED

1. Should the denial of a Certificate of Appealability by the Ninth Circuit Court of Appeal been resolved in a different manner than the one followed by the Eastern District Court of California?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

Bill Lockyer, Attorney General of the state of California

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:
The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

[x] unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is

[x] unpublished.

For cases from **State Courts**:
The opinion of the highest State Court to review the merits appears at Appendix E to the petition and is

[x] unpublished.

The opinion of the California Courts of Appeal appears at Appendix D to the petition and is

[x] unpublished.

The opinion of the Superior Court of California appears at Appendix C to the petition and is
[x] unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 24, 2000.

[x] No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[x] For cases form **state courts**:

The date on which the highest state court decided my case was May 26, 1999. A copy of that decision appears at Appendix E.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII.

Amendment XIV.

28 U.S.C. §2253, Subdivision (c) (2)

California Health & Safety Code, §11351

California Health & Safety Code, §11352, Subdivision (b)

California Health & Safety Code, §11370.2

California Health & Safety Code, §11370.4

California Penal Code, §182

California Penal Code, §667.5, Subdivision (b)

California Penal Code, § 12022, Subdivision (a)(1)

California Penal Code, §12022, Subdivision (c)

STATEMENT OF THE CASE

On October 28, 1996, petitioner, Arturo C. Alderette, was found guilty following a jury trial of one count of transportation for sale of cocaine between non-contiguous counties, in violation of *Health & Safety Code, §11352(b)*; one count of possession of cocaine for sale, in violation of *Health & Safety Code, §11351*; and one count of conspiracy to commit a crime, the transportation and/or possession of cocaine, in violation of *Penal Code, §182.* (CT 124).[1]

The jury also found true the following special allegations: that petitioner was personally armed with a gun, pursuant to *Penal Code, §12022(c)* (counts one and two); that a principle was armed during the commission of the offense, pursuant to *Penal Code, §12022(a)(1)*; that the illegal substance included exceeded one kilogram in weight, pursuant to *Health & Safety Code, §11370.4(a)*; and that petitioner had been convicted of a violation of a violation of *Health & Safety Code, §11351*, on July 7, 1992, within the meaning of both *Health & Safety Code §11370.2* and *Penal Code, §667.5(b).* (CT 17, 18)

At his December 10, 1996, sentencing hearing, the court sentenced petitioner on the transportation to a non-contiguous county conviction to an aggravated state prison term of nine years. (CT 160.) The court imposed consecutive terms on all of the following enhancements: a three-year term for the *Health & Safety Code, §11370.2*; a one-year term for the same prior pursuant to *Penal Code, §667.5(b)*; a mid-term of four years on the armed enhancement pursuant to *Penal Code, §12022(c)*; and a three-year term due to the drug weight enhancement. (CT 161.)

Petitioner was given a total of 471 days in-custody credit. (CT 161.)

A Notice of Appeal was filed on December 10, 1996. (CT 162.)

Petitioner's Direct Appeal was affirmed in the California Courts of Appeal and the California Supreme Court denied petitioner's Petition For Review.

Petitioner is not citing any decision about the two courts

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[1] "CT" refers to "Clerk's Transcripts."

mentioned above because the issues that were raised on direct appeal and in the Petition For Review were not raised in the lower federal courts.

Then, after the California Supreme Court denied petitioner's Petition For Review, petitioner filed a state habeas petition in the trial court alleging that his sentence violated the *8th and 4th Amendments* to the *United States' Constitution* because he received more time than the principal offender, which was denied by the trial court on May 26, 1999 (Appendix C), the Court of Appeal for the First Appellate District of California denied the petition on January 14, 1999 (Appendix D), and the California Supreme Court denied the same on May 26, 1999. (Appendix E.)

On June 20, 1999, petitioner filed a federal habeas corpus petition in the Eastern District of Court of California, raising the same issue, that his sentence violated the *8th and 14th Amendments, United States Constitution*, because he received more time than the principal offender. The Eastern District Court of California denied that petition on November 1, 1999. (Appendix B, pp. 4 – 24.)

On November 17, 1999, petitioner filed his Notice of Appeal along with a Petition for Issuance of Certificate of Appealability and the Eastern District of California denied it on December 3, 1999, because petitioner had failed to show the denial of a constitutional right. *(28 U.S.C. §2253(c)(2).)* (Appendix B, pp. 1–3.)

Finally, on December 12, 1999, petitioner filed a Petition for Issuance of Certificate of Appealability in the Ninth Circuit Court of Appeals and it was denied on March 24, 2000. (Appendix A.)

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari should be granted for two compelling reasons. First, the decision below conflicts with a relevant decision of this Court in *Lozada v. Deeds*, 498 U. S. 430 (1991), as to the issuance of Certificate of Probable Cause/Certificate of Appealability.

Secondly, in denying petitioner's certificate of appealability, the appellate court has so far departed from this Court's mandate in *Lozada v. Deeds*, 498 U. S. 430, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), that exercise of this Court's supervisory power is required.

I

THE DECISION BELOW CONFLICTS WITH *LOZADA V. DEEDS*, 498 U. S. 430, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), AS TO THE ISSUANCE OF CERTIFICATE OF PROBABLE CAUSE/CERTIFICATE OF APPEALABILITY

The federal habeas corpus petition originally alleged that petitioner's sentence violated the *Eighth* and *Fourteenth Amendments to the United States Constitution* (Appendix B) and it was denied by the Eastern District Court of California because petitioner allegedly failed to show a constitutional violation and thereby denied petitioner's certificate of appealability for failure to show a denial of a constitutional right.

The Ninth Circuit Court of Appeal denied petition a certificate of appealability by citing only *28 U.S.C. § 2253(c)(2)*, which, by implication, the denial was for petitioner's failure to show a denial of a constitutional right. (Appendix A.)

The Eastern District Court of California rested its denial of certificate of appealability on *28 U.S.C. § 2253(c)(2)* (Appendix B), and that was presumably the basis for the court of appeals' decision to deny a certificate of appealability, which is contrary and in conflict with this Court's decision in *Lozada v. Deeds*, 498 U. S. 430, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), where this Court held in *Lozada*:

"The denial of the right tot appeal could be resolved

in a different manner than the one followed by the District."

Now, petitioner contends that even though this Court, in *Lozada,* was making a decision as to the certificate of probable cause is also applicable in the instant case, because the new requirement of a certificate of appealability (COA) appears to make no significant change in the standard applicable to the former requirement of the certificate of probable cause (CPC.) Section 102 of the *Antiterrorism and Effective Death Penalty Act (*hereinafter *AEDPA)* provides that a COA may be issued only upon a "substantial showing of a denial of a constitutional right." (*28 U.S.C. § 2253(c)(2).)*

This Court had previously characterized the standard for the former CPC as a "substantial showing of a denial of [a] federal right." *Barefoot v. Estelle,* 463 U. S. 880 (1983) (quoting *Stewart v. Beto,* 454 F.2d 268, 270 n. 2 (5th Cir. 1990), cert. denied, 406 U.S. 925 (1972); see *Rodriguez v. Scully,* 905 F.2d 24 (2d Cir. 1990) (CPC requires a non-frivolous issue "deserving of appellate review".) Thus, the operative words "substantial showing" are identical with respect to both the former CPC and the current COA. The fact that a COA is available only with respect to "constitutional" right, whereas a CPC was stated to be available with respect to a "federal" right is, in the context of a habeas petition under *28 U.S.C. § 2254,* a distinction without a difference since the writ may issue upon the petition of a state prisoner only for a denial of a constitutional right. See *Herrera v. Collins,* 506 U.S. 390 (1993).

Now, this Court must agree with the Second and Tenth Circuits, see *Reyes v. Keane,* 90 F.2d 676 680 (2nd Cir. 1996); *Lennox v. Evans,* 87 F.3d 431, 434-35 (10th Cir. 1996), as to the substantive standard for a COA is the same as the standard for the prior CPC.

Therefore, this Court should reverse the Ninth Circuit's decision as to petitioner's certificate of appealability to resettle the principle that was settled in *Lozada, supra,* and since petitioner, in his original habeas corpus petition which was filed in the Eastern District of California has alleged that his constitutional rights under the *Eighth* and *Fourteenth*

Amendments were violated, the Ninth Circuit should have resolved the certificate of appealability in a different manner than the one followed by the Eastern District of California, *Lozada, supra.* Also see *Gideon v. Wainwright*, 372 U.S. 335 (1963), where this Court recognized that the *Eighth Amendment's* ban on cruel and unusual punishment is made obligatory on the states through the *Fourteenth Amendment*, citing *Robinson v. California*, 370 U. S. 660, reh. denied, 371 U. S. 905 (1962).

II
THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THIS COURT'S MANDATE IN *LOZADA V. DEEDS*, 498 U. S. 430, THAT EXERCISE OF THIS COURT'S SUPERVISORY POWER IS REQUIRED

After this Court's holding in *Lozada v. Deeds*, 498 U. S. 430 (1991), there remained no doubt that when a Circuit Court faces a request for a certificate of probable cause/certificate of appealability, the Circuit Court should resolve the problem in a different manner than the one followed by the District Court, *Lozada, supra.* In other words, this Court held that the presence or absence of a constitutional right violation, the right to appeal can only be taken away after the Circuit Court rules on a certificate of probable cause/certificate of appealability by resolving the problem in a different manner than the one followed by the Eastern District Court of California's basis in denying petitioner's certificate of appealability by citing *28 U.S.C. § 2253(c)(2).* However, the holding in *Lozada* mandates that "the Circuit Courts must resolve the certificate of appealability in a different manner than the one followed by the District Courts." *Id.* at 432.

The mere denial of petitioner's certificate of appealability by the Ninth Circuit by just citing *28 U.S.C. § 2253(c)(3),* was insufficient to deny petitioner's right to appeal as to his constitutional rights. Indeed, that questions presented by petitioner in his request of certificate of appealability to the Ninth Circuit were not even addressed in the Ninth Circuit's decision (Appendix B) and therefore this court, should

reverse this case and remand this case to the Ninth Circuit for a proper decision consistent with *Lozada's* holding.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

Arturo C. Alderette, Declarant

Date: August 22, 2000

petitioner's Certificate of Appealability

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 24 2000
CATHY A. GATTERSON, CLERK,
U.S. COURT OF APPEALS

ARTURO C. ALDERETTE,
Petitioner-Appellant,

v.

ERNIE ROE, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents-Appellees.
_____/

No. 99-17658

DC# CV-99-01383-DAD
Eastern California
(Sacramento)

ORDER

Before: FARRIS and CANBY, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

S:\RESEARCH\COA's\Orders\km\99-17658.2pd

Appealability

FILED
DEC - 3 1999
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ARTURO C. ALDERETTE,
Petitioner, No. CIV S-99-1838 GEB DAD P

vs.

ERNIE ROE, Warden et al.,
Respondents. **ORDER**
_____/

Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's November 1, 1999 denial of his application for a writ of habeas corpus. Petitioner has also requested that the courts issue a certificate of appealability.

Before petitioner can appeal this court's decision, a certificate of appealability must issue. See 28 U.S.C. §2253(c); Fed. R. App. P. 22(b). A certificate of appealability may issue under 28 U.S.C. §2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). The district court must either issue a certificate of appealability indicating which issues satisfy the required showing or state the reasons why such a certificate should not issue. See Fed. R. App. P. 22(b).

/////
/////

For the reasons set forth in the magistrate judge's October 7, 1999 findings and recommendations, petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner's November 17, 1999 petition for issuance of a certificate of appealability is denied; and

2. A certificate of appealability shall not issue in this action.

DATED: December 2, 1999.

/s/Garland E. Burrell
UNITED STATES DISTRICT JUDGE

/aldel 1383.830

FILED
NOV - 1 1999
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ARTURO C. ALDERETTE,
Petitioner, No. CIV S-99-1838 GEB DAD P

vs.

ORDER

ERNIE ROE, Warden et al.,
Respondents.

CLOSED
DATE: 11-1-99

_____/

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On October 7, 1999, the magistrate judge filed findings and recommendations herein which were served on petitioner and which contained notice to petitioner that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(c) and Local Rule 72-304, this court conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by the proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed October 7,

1999, are adopted in full; and

2. Petitioner's application for habeas corpus, as supplemented by petitioner's August 26, 1999 memorandum of points and authorities, is denied.

DATED: October 29, 1999.

/s/ Garland E. Burrell
UNITED STATES DISTRICT JUDGE

/aldel 1383.804

FILED
OCT – 7 1999
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ARTURO C. ALDERETTE,
Petitioner, No. CIV S-99-1838 GEB DAD P

vs.

ERNIE ROE, Warden et al.,
Respondents.
_____/

ORDER AND FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceedings pro se with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In findings and recommendations filed on August 4, 1999, this court found that petitioner's claims involve only the interpretation and application of state law and do not raise a federal question. Before the court are petitioner's objections to the findings and recommendations.

Petitioner contends that his first ground for relief, alleging improper sentencing to the upper term on his drug transportation conviction, states a claim arising under the "Eighth Amendments Equal Protection Clause ban on cruel and unusual punishment." Petitioner argues that his second ground for relief, challenging a sentence enhancement, states a claim arising under "the Eighth and Fourteenth Amendments protections on the Equal Protection Clause prohibiting excessive sentencing."

In light of petitioner's assertion that his claims implicate

federal constitutional rights, the court will vacate the pending findings and recommendations and consider petitioner's constitutional arguments.

BACKGROUND

In 1996, following a jury trial, petitioner was convicted in Solano County Superior Court of transportation of cocaine for sale in violation of California Health and Safety Code § 11352(b). The jury found true the following allegations establishing sentencing enhancements: the offense involved over a kilogram of cocaine under California Health and Safety Code § 11370.4(a)(1); petitioner had a prior narcotics conviction pursuant to California Health and Safety Code § 11370.2; petitioner was armed in the commission of the offense pursuant to California Penal Code § 12022(c); and petitioner had a prior conviction pursuant to California Penal Code § 667.5(b). Petitioner was sentenced to a total term of imprisonment of twenty years.

Petitioner's conviction was affirmed by the California Court of Appeals, First Appellate Division, on September 30, 1997. The California Supreme Court denied review on December 10, 19971. Petitioner filed a series of state petitioner for writ of habeas corpus, the last of which was denied by the California Supreme Court on May 26, 1999. Petitioner filed his federal habeas corpus petition on July 19, 1999.

PETITIONER'S CLAIMS

In his original application for habeas corpus relief, petitioner alleges two grounds for relief, as follows:

> Ground One: COURT IMPROPERLY SENTENCED PETITIONER TO UPPER TERM ON H & S § 11352(b), AND FAILED TO STATE REASONS AND MITIGATION.
>
> The petitioner was a subordinate actor in the sales of the cocaine in this case, and record is clear the police realized petitioner's brother, Juan Alderette, was the principal actor in the sales and

possession of the cocaine. The fact that Juan Alderette was charged as the principal in the charging information.
The fact that Juan Alderette was 'in charge' was testified by the Detective Martinez, and it was an acknowledged fact to the police. The offenses occurred within Juan Alderette's business and the defendants were apprehended in Juan Alderette's vehicle.

The police had tape recorded the sales transaction and one Detective Lopez knew Juan Alderette was 'the one in charge.'

The entire sales transaction was through Juan Alderette, yet Juan only received eight (8) years, while the petitioner received 20 years for playing a minor role in the offense. Furthermore, the sentence[.]

Ground Two: PETITIONER SHOULDN'T HAVE BEEN CHARGED WITH POSSESSION OF FIREARM (P.C. §12022(a)), SINCE GUN IN POSSESSION OF CODEFENDANT

The petitioner was arrested with his brother Juan Alderette, and at the time of the arrest 'Juan Alderette was sitting in the driver's seat. Arturo Alderette was sitting in the passenger seat.' (R.T. 85) The firearm and the cocaine were 'underneath his seat,' and the Detective witnesses [sic] Juan Alderette produce the cocaine from the same place under the driver's seat as was the firearm. (R.T. p. 85) The petitioner was seated in the passenger seat and the vehicle was owned by Juan Alderette's wife, and Juan Alderette was driving the car at the time of the arrest with the firearm within his exclusive possession and control. (R.T. pp. 189-190) The petitioner was not personally armed, as used in P.C. §12022(c), and therefore the armed allegation should not apply to the petitioner.

Pet. at 5.

In a memorandum of points and authorities included in petitioner's August 26, 1999 objections to this court's August 4, 1999 findings and recommendations, petitioner contends, as to his first ground for relief, that he alleged improper sentencing violated the "Eighth Amendments Equal Protection Clause ban on cruel and unusual punishment" and, as to his second ground for relief, that the firearm allegation violated "the Eighth and Fourteenth Amendments protections on the Equal Protection Clause prohibiting excessive sentencing."

ANALYSIS

A federal writ of habeas corpus is available under 28 U.S.C. § 2254 "only on the basis of some transgression of federal law binding on the state courts." Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)), cert. denied, 478 U.S. 1021 (1986). As a general rule, federal habeas relief is not available for errors in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986). In particular, habeas corpus relief is unavailable for state sentencing errors in the absence of a violation of federal law or actions so fundamentally unfair as to constitute a due process violation. See Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994) ("Absent a showing of fundamental unfairness, a state court's misapplication of its own sentencing laws does not justify federal habeas relief."); Miller v. Vasquez, 868 F.2d 1116, 1118-19 (9th Cir. 1989) (whether a particular crime qualifies as a serious felony under California's sentence enhancement provision is a question of state sentencing law not subject to federal habeas review); Kennick v. Superior Court, 736 F.2d 1277, 1280 (9th Cir. 1984) (absent arbitrary or discriminatory action, a mistake of state law does not constitute a due process violation).

I. Petitioner's Original Claims

Petitioner claims the trial court committed sentencing errors with regard to petitioner's conviction of transportation

of cocaine for sale in that the trial court improperly selected the upper term for the conviction, failed to state reasons for the sentence imposed, failed to consider mitigating factors, and sentenced petitioner to a longer term than petitioner's codefendant received pursuant to a plea bargain. Petitioner also claims he shouldn't have been charged with possession of a firearm since the gun and the drugs were under the driver's seat of the car and petitioner's co-defendant was in the driver's seat.

The court finds that both of petitioner's claims, as originally alleged, involve only the interpretation and application of state law and do not allege actions so fundamentally unfair as to constitute a due process violation.

II. Petitioner's Supplemental Claims

Petitioner now alleges that the trial court violated the "Eight (sic) Amendments Equal Protection Clause ban on cruel and unusual punishment" by imposing on him a twenty-year sentence while his co-defendant received an eight-year sentence pursuant to a plea bargain. He further alleges that the trial court violated the "Eighth and Fourteenth Amendments protections on the Equal Protection Clause prohibiting excessive sentencing" by imposing a four year enhancement for being armed.

A. Exhaustion of State Court Remedies

The exhaustion of state court remedies is a prerequisite to the granting of a federal petition for writ of habeas corpus. See 28 U.S.C. § 2254(b)(1). A petitioner satisfies the exhaustion requirement by fairly presenting to the highest state court all federal claims before presenting them to the federal court. See Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam); Picard v. Connor, 404 U.S. 270, 275-76 (1971); Crotts v. Smith, 73 F.3d 861, 865 (9th Cir. 1996); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1986).

A federal claim has been fairly presented to the state's highest court if the petitioner has described the operative facts and legal theories upon which his claim is based. See Bland v. California Dep't of Corrections, 20 F.3d 1469, 1478

(9th Cir. 1994), cert. denied, 513 U.S. 947 (1994). A claim is unexhausted where the petitioner did not fairly present the legal basis for his claim to the state court. See Picard, 404 U.S. at 276-77. As a rule, the "mere similarity of claims is insufficient to exhaust." Duncan v. Henry, 513 U.S. at 366. See also Anderson v. Harless, 459 U.S. 4, 6 (1982) ("It is not enough... that a somewhat similar state-law claim was made.").

The United States Supreme Court has observed that, "[i]f state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." Duncan v. Henry, 513 U.S. at 365. Thus, a federal claim has not been exhausted if the claim is merely inherent in facts alleged in the state court, Picard, 404 U.S. at 277, or even arguably self-evident, Anderson, 459 U.S. at 7. "Instead, 'a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts which entitle the petitioner to relief.'" Gatlin v. Madding, ___ F.3d ___, No. 98-56249, 1999 WL 642038, at *4 (9th Cir. Aug. 25, 1999) (quoting Gray v. Netherland, 518 U.S. 152, 162-63 (1996)).

On the record before the court in the present case, this court finds that petitioner does not appear to have exhausted state court remedies with regard to his federal constitutional claims. The record does not reflect that petitioner asserted federal constitutional violations when he presented his claims to the California Supreme Court on direct appeal or on collateral review. (See Pet. at 3 & Ex. A-G; Objections to Findings & Recommendations at 2-8.) Thus, it appears that petitioner has raised in federal court legal theories that were not fairly presented to the state's highest court.

Exhaustion of state court remedies may not be waived unless waived explicitly by the respondents' counsel. See 28 U.S.C. § 2254(b)(3). A waiver of exhaustion may not be either implied or inferred. However, a petition may be denied on the merits without exhaustion of state court remedies. See 28 U.S.C. § 2254(b)(2). Accordingly, the court will consider whether the present petition may be denied on the merits.

B. Petitioner's Eighth Amendment Claims

The petitioner in this case was convicted of transporting cocaine for purposes of sale. In addition, the jury found that petitioner was personally armed with a gun; that a principal was armed during the commission of the offense; that the illegal substance involved exceeded one kilo in weight, and that petitioner had previously been convicted of a violation of California Health & Safety Code § 11351 on July 7, 1992.

1. Sentence Imposed on the Conviction of Transporting Cocaine

Under California law, "any person who transports for sale any controlled substances...within this state from one county to another noncontiguous county shall be punished by imprisonment in the state prison for three, six, or nine years." Cal. Health & Safety Code § 11352(b). A sentence of up to nine is thus within the punishment mandated under California Law for transporting cocaine for purposes of sale.

Petitioner's argument that his sentence to the upper term violates the Eighth Amendment's prohibition of cruel and unusual punishment is unpersuasive. A criminal sentence will be deemed unconstitutional only if it is extreme and grossly disproportionate to the crime for which the defendant was convict. See United States v. Dubose, 146 F.3d 1141, 1147 (9th Cir.) [sic] (as amended), cert. denied sub nom. Dean v. United States, ___ U.S. ___, 119 S. Ct. 430 (1998); Belgrade v. Montana, 123 F.3d 1210, 1215 (9th Cir. 1997). See also Harmelin v. Michigan, 501 U.S. 957 (1991). "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." Rummel v. Estelle, 445 U.S. at 263, 272 (1980). Moreover, federal courts must be "'reluctan[t] to review legislatively mandated terms of imprisonment.'" Hutto v. Davis, 454 U.S. 370, 374 (1982) (quoting Rummel, 445 U.S. at 274). "Generally, as along as the sentence imposed upon the defendant does not exceed the statutory limits, [a federal court] will not overturn it on eighth amendment grounds." United Sates v. Zavala-Serra, 85 F.2d 1512, 1518 (9th Cir.

1988). In the present case, petitioner's sentence does not exceed the statutory limit and does not appear to be grossly disproportionate to the crime of which petitioner was convicted.

To the extent petitioner may contend that his sentence violates the Equal Protection Clause, his claim is also unavailing. Petitioner's claim is premised merely on the fact that his sentence exceeds that of his co-defendant. In this regard, petitioner alleges that the evidence established that his co-defendant was "the one in charge" of the underlying cocaine transaction, while petitioner played a minor role in the offense, and that petitioner nonetheless received a harsher sentence. Petitioner's allegation that his more culpable co-defendant received a lesser sentence than his is insufficient to state a Fourteenth Amendment equal protection claim. To state such a claim petitioner bears the burden of establishing a prima facie case of uneven application. See McQueary v. Blodgett, 924 F.2d 829, 835 (9th Cir. 1991). Pointing to examples of those allegedly receiving more lenient sentences for more serious offenses than that of petitioner is insufficient. Id. Even if proven, such allegations fail to make out a prima facie case because

> a mere demonstration of inequality is not enough; the Constitution does not require identical treatment. There must be an allegation of invidiousness or illegitimacy in the statutory scheme before a cognizable claim arises; it is a "settled rule that the Fourteenth Amendment guarantees equal laws, not equal results."

McQueary, 924 F.2d at 835 (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979)); see also Berroteran-Melendez v. I.N.S., 955 F.2d 1251, 1258 (9th Cir. 1992) (petitioner claiming he was treated differently than another alien who also was seeking asylum by pointing to the fact that he received a different decision found not to have raised an equal protection issue.) Therefore, petitioner has not stated a cognizable equal protection claim.

2. Firearm Enhancement

California law provides for an additional term of imprisonment for "any person who is personally armed with a firearm" in the commission of certain violations of the California Health and Safety Code, including § 11352. Cal. Penal Code § 12022(c). California courts have determined that a defendant is "personally armed" for purposes of § 12022(c) if the defendant had the firearm on his or her person or had a firearm available for use. See People v. Mendival, 2 Cal.App.4th 562, 3 Cal.Rptr.2nd 566 (1992).

Petitioner in this case argues that the trial court should not have imposed a four-year term pursuant to the enhancement provision because the gun involved in the crime belonged to his brother and was under his brother's seat in the car when they were arrested. However, under California law, two individuals can be "personally armed" with one firearm, and both are subject to the sentence enhancement statute if the firearm was available for use by both of them. See Mendival, 2 Cal.App.4th 574, 3 Cal.Rptr.2d at 574 (holding that two defendants convicted of transporting cocaine for sale and offering cocaine for sale were both personally armed with a firearm for purposes of health & Safety Code § 12022(c) [sic] where only one firearm was found on the floorboard of the defendants' car on the passenger side). See also People v. Bland, 10 Cal.4th 991, 43 Cal.Rptr.2d 77 (1995) (holding that a defendant is subject to an arming enhancement when he possesses drugs and a gun and keeps them together, even if he is not present when the police seize the drugs and gun from the defendant's house.)

A state legislature is entitled to deference to its ability and power to prescribe sentences for persons convicted of crimes within the state's borders. See Rummel v. Estelle, 445 U.S. 263, 275-76 (1980). "[E]nhanced-sentence laws, and procedures designed to implement their underlying policies, ...have been enacted in all the States...[and] have been sustained...on several occasions against contentions that they violate constitutional strictures," including the prohibition against cruel and unusual punishment. Spencer v. Texas, 385 U.S. 554, 559-60 (1967). A federal "court lacks authority to act as a super legislative body dictating the

policy considerations that may motivate a state in enhancing the punishment for a crime." Eckert v. Tansy, 936 F.2d 444, 449 (9th Cir. 1991) (quoting Cocio v. Bramlett, 872 F.2d 889, 895 (9th Cir. 1989)). Moreover, federal courts are bound by a state court's construction of its own laws. See Brodheim v. Rowland, 993 F.2d 716, 717 (9th Cir. 1993); Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir.), [sic] cert. denied, 493 U.S. 942 (1989). A federal court may suspend its deference to a state court's interpretation of its own law "only upon a finding that the court's interpretation is untenable or amounts to a subterfuge to avoid federal review of a constitutional violation." Oxborrow, 877 F.2d at 1399; see also Brodheim, 993 F.2d at 717; Taylor v. Kincheloe, 920 F.2d 599, 09 (9th Cir. 1990).

In the present case, this court is unable to find that the state court's interpretation of its enhancement statute is untenable or that the statute was adopted to thwart federal review. Nor does the court find that a four-year term of imprisonment for an arming enhancement in the context of a drug conviction is so disproportionate as to shock the conscience and thereby constitute cruel or unusual punishment. Again, to the extent petitioner's argument is based upon notions of equal protection, he has failed to state a cognizable claim for the reasons set forth above.

/////

C. Conclusion

For the reasons set forth above, this court finds that petitioner's apparently unexhausted constitutional claims lack merit and may be denied. This court will recommend summary dismissal of petitioner's habeas corpus application pursuant to Rule 4 of the Rules Governing § 2254 Cases. See Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) ("The district court may enter an order for the summary dismissal of a habeas petition '[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court....'").

Accordingly, IT IS HEREBY ORDERED that this court's August 26, 1999 memorandum of points and authorities, be denied.

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, petitioner may file written objections with the court. The document should be captioned "Objections to Findings and Recommendations." Petitioner is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: October 6, 1999.

/s/ Dale A. Drozd
DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

DAD:kw
aldel 1383.f&r

FILED
AUG - 4 1999
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ARTURO C. ALDERETTE,
Petitioner, No. CIV S-99-1838 GEB DAD P

vs.

ERNIE ROE, Warden et al.,
Respondents.
_____/

ORDER AND FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

Examination of the in forma pauperis affidavit reveals that petitioner is unable to afford the costs of suit. Accordingly, the request for leave to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

In 1996, petitioner was convicted in Solano County Superior Court of transportation of cocaine for sale, in violation of California Health and Safety Code § 11352(b). In addition, the jury found true the following allegations establishing sentencing enhancements: the offense involved over a kilogram of cocaine under California Health and Safety Code § 11370.4(a)(1); petitioner had a prior narcotics conviction pursuant to California Health and Safety Code § 11370.2; petitioner was armed in the commission of the offense pursuant to California Penal Code § 12022(c); and

petitioner had a prior conviction pursuant to California Penal Code § 667.5(b). Petitioner was sentenced to a total term of imprisonment of twenty years.

Petitioner alleges the following claims in his petition filed with this court:

Ground One: COURT IMPROPERLY SENTENCED PETITIONER TO UPPER TERM ON H & S § 11352(b), AND FAILED TO STATE REASONS AND MITIGATION.

The petitioner was a subordinate actor in the sales of the cocaine in this case, and record is clear the police realized petitioner's brother, Juan Alderette, was the principal actor in the sales and possession of the cocaine. The fact that Juan Alderette was charged as the principal in the charging information.
The fact that Juan Alderette was 'in charge' was testified by the Detective Martinez, and it was an acknowledged fact to the police. The offenses occurred within Juan Alderette's business and the defendants were apprehended in Juan Alderette's vehicle.

The police had tape recorded the sales transaction and one Detective Lopez knew Juan Alderette was 'the one in charge.'

The entire sales transaction was through Juan Alderette, yet Juan only received eight (8) years, while the petitioner received 20 years for playing a minor role in the offense. Furthermore, the sentence[.]

Ground Two: PETITIONER SHOULDN'T HAVE BEEN CHARGED WITH POSSESSION OF FIREARM (P.C. §12022(a)), SINCE GUN IN POSSESSION OF CODEFENDANT

The petitioner was arrested with his brother Juan Alderette, and at the time of the arrest

> 'Juan Alderette was sitting in the driver's seat. Arturo Alderette was sitting in the passenger seat.' (R.T. 85) The firearm and the cocaine were 'underneath his seat,' and the Detective witnesses [sic] Juan Alderette produce the cocaine from the same place under the driver's seat as was the firearm. (R.T. p. 85) The petitioner was seated in the passenger seat and the vehicle was owned by Juan Alderette's wife, and Juan Alderette was driving the car at the time of the arrest with the firearm within his exclusive possession and control. (R.T. pp. 189-190) The petitioner was not personally armed, as used in P.C. §12022(c), and therefore the armed allegation should not apply to the petitioner.

Pet. at 5.

A federal writ of habeas corpus is available under 28 U.S.C. § 2254 "only on the basis of some transgression of federal law binding on the state courts." Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)), cert. denied, 478 U.S. 1021 (1986). It is not available for errors in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986).

In the present case, petitioner claims that at sentencing the trial court improperly selected the upper term, failed to state reasons for the sentence imposed, failed to consider mitigating factors, and sentenced petitioner to a longer term that that of his co-defendant. Petitioner does not assert that these alleged errors violate federal law. Nor does petitioner contend that the alleged sentencing errors under California State sentencing statutes rise to the level of federal constitutional significance.

Habeas corpus relief is not available for state sentencing errors absent a violation of federal law or actions so fundamentally unfair as to constitute a due process violation. See Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994) ("Absent a showing of fundamental unfairness, a state court's

misapplication of its own sentencing laws does not justify federal habeas relief."); Miller v. Vasquez, 868 F.2d 1116, 1118-19 (9th Cir. 1989) (California sentence enhancement provisions involve questions of state law not subject to federal habeas corpus review); Kennick v. Superior Court, 736 F.2d 1277, 1280 (9th Cir. 1984) (a mistake of state law does not constitute a due process violation absent arbitrary or discriminatory action). See also Green v. United States, 365 U.S. 301, 306 (1961). While petitioner in the present case has alleged that he received a 20-year sentence while his co-defendant received an 8-year sentence, the court cannot infer a violation of the Equal Protection Clause or the Eighth Amendment in the absence of allegations that the two defendants' circumstances were identical.

Petitioner's second claim is that he shouldn't have been charged with possession of a firearm since the gun and the drugs were under the driver's seat of the car and petitioner's codefendant was in the driver's seat. Again petitioner challenges the sate court's interpretation of its own laws. California Penal Code § 12022(c) provides for an additional term of imprisonment for "any person who is personally armed with a firearm" in the commission of certain violations of the California Health and Safety Code, including § 11352. California courts have held that a defendant is "personally armed" for purposes of § 12022(c) if the defendant had the firearm on his or her person or had a firearm available for use. See People v. Mendival, 2 Cal.App.4th 562, 3 Cal.Rptr.2nd 566 (1992) (two defendants convicted of transporting cocaine for sale and offering cocaine for sale were both personally armed with a firearm for purposes of Health and Safety Code § 12022(c) [sic] where only one firearm was found on the floorboard of the defendants' car on the passenger side). Under California law, two individuals can be "personally armed" with one firearm, and both are subject to the sentence enhancement statute if the firearm was available for use by both of them. See Mendival, 2 Cal.App.4th at 574, 3 Cal.Rptr.2d at 574. See also People v. Bland, 10 Cal.4th 991, 43 Cal.Rptr.2d 77 (1995) (a defendant is subject to an arming enhancement when he possesses drugs and a gun and keeps them together, even if he is not present when the police seize the drugs and gun from the defendant's house.)

The court finds that petitioner's claims involve interpretation and application of state law and that petitioner's grounds for relief do not raise a federal question. Petitioner's application for habeas corpus relief thus fails to state a cognizable federal claim. This court will therefore recommend summary dismissal of petitioner's habeas corpus application pursuant to Rule 4 of the Rules Governing § 2254 Cases. See Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) ("The district court may enter an order for the summary dismissal of a habeas petition '[I]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court....'").

Accordingly, IT IS HEREBY ORDERED that petitioner's application to proceed in forma pauperis is granted; and

IT IS HEREBY RECOMMENDED that petitioner's application for habeas corpus be denied.

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, petitioner may file written objections with the court. The document should be captioned "Objections to Findings and Recommendations." Petitioner is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 4, 1999.

/s/ Dale A. Drozd
DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

DAD:kw
aldel 1383.156

ENDORSED FILED
98 NOV 19 AM 8:26
CHARLES D. RAMEY
By: /s/ M. BONNET

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SOLANO
DEPARTMENT TWELVE

In the Matter of the Application of: **No. C47166**

ARTURO CHAIDEZ ALDERETTE,

For a Writ of Habeas Corpus. /

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Upon the filing and reading of the Petitioner's application for a Writ of Habeas Corpus in the above-entitled matter and upon consideration of the same, THE COURT FINDS:

Petitioner again asks this Court to conduct an appellate review of his conviction. A Petition for a Writ of Habeas Corpus is not a substitute for appeal, nor is it a second appeal. See In Re Harris (1993) 5 Cal.4th 813. The issues raised herein are properly raised on appeal as they concern matters contained within the record.

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus is hereby denied.

DATED: November 13, 1998

/s/ Allan P. Carter
ALLAN P. CARTER
Judge of the superior Court

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

In re ARTURO CHAIDEZ ALDERETTE on Habeas Corpus

A085352

FILED
Court of Appeal – First App. Dist.
JAN 14 1999
RON D. BARROW, CLERK
By:_____
DEPUTY

BY THE COURT

The petition for writ of habeas corpus is denied.

(Hanlon, P.J. and Reardon, J. participated in the decision.)

Date: JAN 14 1999 /s/ HANLON, P.J.

APPENDIX E

Order of the California Supreme Court denying petitioner's State Habeas Corpus petition.

SUPREME COURT
FILED
MAY 26 1999
Robert Wandruff, Clerk

Deputy

SO76369

IN THE SUPREME COURT OF CALIFORNIA

IN RE ARTURO CHAIDEZ ALDERETTE

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED. (***In re Dixon*** (1953) 41 Cal.2d 756, 759; ***In re Lindley*** (1947) 29 Cal.2d 709, 723; ***People v. Duvall*** (1995) 9 Cal.4th 464, 474.)

/s/ George
Chief Justice

No.

IN THE

Supreme Court of the United States

ARTURO C. ALDERETTE,
Petitioner,

v.

ERNIE ROE, WARDEN,
Respondent.

PROOF OF SERVICE

I, Arturo C. Alderette, do swear or declare that on this date, August 22, 2000, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the U.S. Mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Ernie Roe, Warden, 44750 60th Street West, Lancaster, CA 93536;

Bill Lockyer, Attorney General of California, 300 S. Spring St., 10th Fl., Los Angeles, CA 90013.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 22, 2000.

arturo alderette
Arturo C. Alderette, Declarant